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EXAMINER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte GERWIN DAMBERG, MARTIN J. RICHARDS, and
CRAIG TODD

Appeal 2015-004606
Application 14/112,347
Technology Center 2600

Before JAMES R. HUGHES, CARL L. SILVERMAN, and
JAMES W. DEJMEK, *Administrative Patent Judges*.

HUGHES, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Pursuant to 37 C.F.R. § 41.52, Appellants filed a Request for Rehearing (Req. Reh'g) alleging a misapprehension or oversight by this Board in a Decision on Appeal mailed February 2, 2017.¹ In that Decision, the Board affirmed the Examiner's rejections of claims 1, 3–18, 20, 24, 25, 28, and 29 under 35 U.S.C. § 103(a).

¹ We refer to Appellants' Request for Rehearing ("Req. Reh'g.") filed Apr. 2, 2017 and our Decision on Appeal ("Dec.") mailed Feb. 2, 2017. We also refer to Appellants' Appeal Brief ("App. Br."), filed Oct. 30, 2014 and Reply Brief ("Reply Br."), filed Mar. 11, 2015, and the Examiner's Answer ("Ans."), mailed Jan. 15, 2015 and Final Office Action ("Final Act."), mailed July 2, 2014.

ANALYSIS

In the Request for Rehearing received April 2, 2017, Appellants contend “the Board misapprehended the teachings of Min regarding the alleged processing of the saturated region” and “the Board . . . overlooked Dolby’s arguments in the Reply Brief regarding the lack of rational underpinning for combining Mori with Nishida and Min” (Req. Reh’g. 3). We have carefully reviewed the Decision in light of Appellants’ allegations of error. We find Appellants’ contentions to be without merit and we decline to make any substantive change to our Decision.

The Board’s Purported Misapprehension of Min

With respect to Appellants’ first point of error, that “the Board misapprehended the teachings of Min” (Req. Reh’g. 3), Appellants contend the Examiner incorrectly interpreted Min and the Board erred in “basing its decision on” (Req. Reh’g. 2) the Examiner’s improper findings. *See* Req. Reh’g. 2–11. Appellants focus on statements by the Examiner (Ans. 3–6; Final Act. 21) and the Board (Dec. 5–6) that Min purportedly performs histogram stretching on saturated image portions. *See* Req. Reh’g. 2–11. Even if, *arguendo*, Appellants are correct that the Examiner incorrectly interpreted Min with respect to performing histogram stretching on saturated image portions, these arguments fail to address the basis of Examiner’s actual rejection and the corresponding support in Min for the rejection — that is, the Examiner’s findings with respect to Min’s teaching of a second threshold. Therefore, Appellants’ arguments do not persuade us that we misapprehended any relevant fact in our original Decision. Nevertheless, we address Appellants’ arguments to more thoroughly explain and clarify our findings concerning Min.

In Appellants' Appeal Brief and Reply Brief, Appellants focused their arguments on the Examiner's discussion of Min's teaching of processing saturated images, without addressing the actual basis of the Examiner's rejection — that Min teaches or suggests a threshold (second threshold) for luminance values. *See* App. Br. 5–13; Reply Br. 4–11. In particular, Appellants focused on the Examiner's citations of Min, which Appellants contend describe “a saturation threshold and saturated portions of an image, which . . . have more than a predetermined number of high luminance pixels” (App. Br. 10) rather than “no more than a predetermined number of pixels” (claim 1) as required by the disputed limitations of claim 1. *See* App. Br. 5–13; Reply Br. 4–11. The Board agreed with the Examiner and explained that Min teaches or at least suggests a saturation (second) threshold — “[w]e agree with the Examiner that Min at least suggests a second threshold (saturation image level) and image processing such that no more than a ‘predetermined number of pixels,’ that is Min's frequency (of pixels, *see* Fig. 5B), exceeds the second threshold (saturation image level).” Dec. 5–6. Appellants do not persuasively explain how or why the Board's findings result in reversible error— that is, how the Board's interpretation of Min or the Board's agreement with the Examiner on this aspect of Min is inaccurate or incorrect. In other words, Appellants do not persuasively explain how the Board misapprehended these particular teachings of Min. *See* Req. Reh'g. 2–11.

The Board also stated “[t]he Examiner found that Min describes histogram stretching (image processing) of image portions (image data) that are saturated, i.e., where a group of pixels (in the processed image) would include too many pixels having luminance values that are too high” and

“Min further describes processing the image (histogram stretching) such that some high luminance pixels are preserved, but the image portions are desaturated — the number of pixels with a luminance above a threshold (saturation) is reduced.” Dec. 5.

On review, we clarify our findings summarized in the above statements to eliminate any ambiguity. In our Decision (*id.*) we agreed with the Examiner that Min describes image processing of image data, including histogram stretching of portions of the image data, where the original image (image data) includes saturated portions having too many pixels with luminance values that are too high.

Min describes histograms — frequency (quantity) distributions of data having particular values — in this instance image level (brightness) histograms, and determining an image saturation threshold (saturated image level). *See* ¶ 54; Fig. 3A. Therefore, Min teaches a luminance value (second) threshold.

Appellants are correct that Min also describes excluding the saturated image portions (data having an image level above the saturated image level) from histogram stretching. *See* Req. Reh’g. 2–11. Min, however, further describes shifting image data (described in a histogram) prior to histogram stretching such that the number of pixels (frequency) having a particular image level (brightness) (*see* Fig. 5B, x-axis) is reduced (shifted to middle). *See* ¶¶ 54, 59, 61; Figs. 3A, 5B, 6; Dec. 5–6 (citing Ans. 3–6). Therefore, Min teaches processing image data such that no more than a predetermined number (frequency) of pixels have an image level (brightness or luminance value) that is greater than (exceeds) a particular image level (a luminance value threshold (second threshold)). Appellants are correct that Min does

not describe a specific threshold value with respect to Fig. 5B (*see* Req. Reh’g. 9–11), but the Examiner found and the Board agreed (*supra*) that Min generally teaches reducing the frequency of pixels, i.e., a predetermined number, above a particular image level, i.e., a threshold. Similarly, Appellants’ claim 1 also does not recite a particular threshold value, so Min need not recite a particular threshold value to meet the claim limitation at issue.

Additionally, we note that Appellants misinterpret Min’s Fig. 5B, stating that Fig. 5B depicts data that has already been stretched. *See* Req. Reh’g. 4, 9–10. Min explicitly describes Fig. 5B as depicting input image data (data that has not been stretched) and mapping the data using a gamma curve to shift the data prior to stretching. *See* ¶¶ 49, 59. In view of Min’s disclosure, the Board’s findings with respect to Min in the Decision, and Appellants’ detailed but ultimately unavailing arguments in the Request for Rehearing, Appellants’ do not persuade us that we overlooked or misapprehended any relevant facts in our original Decision.

The Examiner’s Rationale for Combining

With respect to Appellants’ second point of error, that the Board “overlooked [Appellants’] arguments in the Reply Brief regarding the lack of rational underpinning for combining Mori with Nishida and Min” (Req. Reh’g. 3), Appellants contend that the “Decision’s misapprehension of the teachings of Min also taints its conclusion that the Examiner provided adequate rational underpinning for the obviousness rejections, all of which relied upon Min as teaching the limitation discussed in Section II above” (Req. Reh’g. 11). *See* Req. Reh’g. 11–12. As we explained (*supra*), the Board did not misapprehend the teachings of Min. Further, the Board

thoroughly addressed Appellants' arguments concerning the combinability of Mori, Nishida, and Min in the Decision. *See* Dec. 6–7.

Appellants further contend that the Board overlooked combinability arguments made in the Reply Brief with respect to the secondary references. *See* Req. Reh'g. 12–16 (referencing Reply Br. 14–18). Appellants are correct that the “Decision makes no reference to any of the above arguments” (Req. Reh'g. 15). The Board did not, however, overlook Appellants' arguments in the Reply Brief concerning the secondary references. Rather, the Decision addressed Appellants' combinability arguments with respect to the secondary references (Kroll, Holman, Glückstad '874, Glückstad '948, and Routley) made in the Appeal Brief. *See* Dec. 7–8 (referencing Appeal Br. 16–18). The Board addressed Appellants' arguments concerning the combinability of the secondary references with Mori, Nishida, and Min in the Decision and explained that Appellants' arguments were not persuasive of Examiner error. *See* Dec. 7–8. The Board did not address Appellants combinability arguments made for the first time in the Reply Brief (*see* Reply Br. 14–18) because those arguments were waived.

“Any argument raised in the reply brief which was not raised in the appeal brief, or is not responsive to an argument raised in the examiner's answer, including any designated new ground of rejection, will not be considered by the Board for purposes of the present appeal, unless good cause is shown.” 37 CFR § 41.41(b)(2) (2012); *see also Ex parte Nakashima*, 93 USPQ2d 1834, 1837 (BPAI 2010) (informative) (explaining that arguments and evidence not presented timely in the principal brief, will not be considered when filed in a Reply Brief, absent a showing of good

cause explaining why the argument could not have been presented in the principal brief). The Reply Brief is not “an opportunity to make arguments that could have been made in the principal brief on appeal to rebut the Examiner’s rejections, but were not.” *Ex parte Borden*, 93 USPQ2d 1473, 1477 (BPAI 2010) (“Informative”).

Appellants’ combinability arguments (*supra*) were not made in the Appeal Brief, but could have been, and are not responsive to any new evidence set forth by the Examiner in the Answer. Absent a showing of good cause why the arguments could not have been presented in the Appeal Brief, which Appellants’ did not provide, Appellants’ arguments are untimely and deemed waived. We declined to consider these arguments raised for the first time in the Reply Brief. *See Ex parte Nakashima*, 93 USPQ2d at 1837; *Ex parte Borden*, 93 USPQ2d at 1477.

In the Appeal Brief, Appellants made general arguments concerning the combinability of the secondary references with Mori, Nishida, and Min. *See supra*; Dec. 7–8; Appeal Br. 16–18. The Examiner, in response to Appellants’ general combinability arguments, clarified and supplemented the rationale for combining each of these references in the Examiner’s Answer. *See* Ans. 9, 11–14. Appellants, for the first time in their Reply Brief, responded with more detailed contentions concerning purported deficiencies in the Examiner’s rationale for combining the references. *See* Reply Br. 14–18. The Examiner, however, has not been provided an opportunity to respond to Appellants’ new contentions. Further, as with the Appeal Brief (*see* Appeal Br. 16–18), Appellants’ quoted the Examiner’s response and averred that the Examiner failed to sufficiently explain why one of ordinary skill in the art would have modified and/or combined Mori,

Nishida, and Min with the discussed features of the secondary references. *See* Reply Br. 14–18. As in their Appeal Brief (*see* Dec. 8), Appellants did not explain how the Examiner’s rationale lacked the requisite rational underpinning — that is, how the Examiner’s rationale for combining the references (generally, improved functionality) (*see* Ans. 9, 11–14) was improper or beyond the skill of the ordinarily skilled artisan (*see* Dec. 8). *See* Reply Br. 14–18.

None of Appellants’ arguments persuade us that we misapprehended any points of law or fact in our original Decision. For these reasons, we find Appellants’ arguments unpersuasive of error, either in our Decision or the Examiner’s rejection, and we decline to modify our Decision.

CONCLUSION

To the extent we have provided additional clarification beyond that of our Decision, Appellants’ Request for Rehearing is granted, in that we have considered Appellants’ arguments and provided additional explanation which we incorporate into the Decision. We provide, herein, additional explanation with respect to the Min reference and Appellants’ combinability arguments presented in the Reply Brief and we modify our Decision to further incorporate these explanations and clarifications. As discussed *supra*, however, we find Appellants’ arguments unpersuasive of Examiner error and maintain our Decision affirming the Examiner’s decision rejecting claims 1, 3–18, 20, 24, 25, 28, and 29.

In view of the foregoing discussion, we grant Appellants’ Request for Rehearing. We decline to modify our original Decision.

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No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

REQUEST FOR REHEARING – GRANTED